United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4046

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	)	
Petitioner,	)	
v.	)	No. 75-4046
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,	)	
Respondents.	)	

BRIEF FOR INTERVENORS
GENERAL TELEPHONE COMPANY OF CALIFORNIA ET AL.

We adopt the Statement of the Case in the brief submitted by Petitioner American Telephone and Telegraph Company. We also support the arguments made by Petitioner and agree that there can be no doubt that the 1972 order of the Federal Communications Commission in Docket No. 19129 did not constitute a "prescription" of a rate of return within the meaning of § 205(a) of the Communications Act. However, we submit that it is unnecessary to determine the proper meaning of the 1972 order in Docket No. 19129, because even if it could be construed as a "prescription" it would not bar the subsequent filing of carrier-initiated rates.

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A Prescription of Rates in a General Revenue Proceeding Involving a General Adjustment of Rates Does Not Bar the Filing of Carrier-Initiated Rates for the Future.

The language of § 205 (a) of the Communications Act makes it clear that the restraining future effect of a prescription is limited to a prescription of a specific "charge, classification, regulation, or practice" rather than a general rate adjustment. This follows from the fact that after the Commission has found a violation of the Act and has prescribed the just and reasonable charge to be thereafter observed, § 205(a) provides for an order that the carrier "shall cease and desist from such violation ... and shall not thereafter publish, demand or collect any charge other than the charge so prescribed ...." Thus, the prohibition against publishing a charge other than the one prescribed is expressly made dependent on the issuance of an appropriate cease and desist order. It is clear that such an order can be made only with respect to specific charges which are in effect at the time of the issuance of the order, but not in the case of a general rate adjustment, to become effective after Commission approval.

An example of such a cease and desist order is found in R.C.A. Communications v. United States, 43 F. Supp. 851 (S.D.N.Y. 1942), where the court upheld an order of the

Federal Communications Commission reducing the ratio for urgent telegraph messages from double to not more than 1-1/2 times the ordinary rate. The order of the Commission in that case provided as follows (43 F. Supp. at 853):

> "' * * * that on and after the 1st day of July, 1941, the lawful charge for handling Urgent Full Rate and Urgent CDE messages (except Press Urgent messages) shall not exceed 1-1/2 times the charge for handling Ordinary Full Rate and Ordinary CDE messages, respectively, . . ."
>
> "' * * * that on and after the 1st day of July, 1941, The Western Union Telegraph Company, R. C. A. Communications, Inc., and the Commercial Cable Company shall cease and desist charging, collecting and receiving, or participating in charges for Urgent Full Rate and Urgent CDE messages (except Press urgent messages) as set forth hereinabove which bear any greater ratio than 1-1/2 to 1 to the charges for Ordinary Full Rate and Ordinary CDE messages, respectively."

No such cease and desist order was made by the Commission in Docket No. 19129, nor could it have been made.

In addition to the express language of § 205(a), there are other considerations which require the conclusion that a prescription of rates in a general revenue proceeding does not affect the right of carriers to initiate rate changes.

Both the United States Supreme Court and this Court have recognized that the provisions governing changes in carrier rates reflect a Congressional intent to establish

a careful balance and compromise of competing interests. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 697 (1973); American Tel. & Tel. Co. v. FCC, 487 F.2d 865 (2d Cir. 1973). It is unthinkable that this careful balance can be upset and the entire statutory scheme set at naught by the simple device of using the word "prescribe" in approving a general rate adjustment. Otherwise, a carrier's right to initiate rate changes would only exist with respect to its first filing of a general rate adjustment. Even if after suspension and hearing the Commission approved the rate changes as filed, it could, by calling its approval a "prescription," forever prevent future carrier-initiated rate changes. Merely to state such consequences is to establish that a "prescription" in a general rate adjustment case can have no such effect.

This conclusion is further supported by the Supreme Court's treatment of a rate prescription in the Permian Basin Area Rate Cases, 390 U.S. 747 (1968). This was an unusual case involving the fixing of a price for natural gas sold by a large number of competitors. The Supreme Court upheld an order of the Federal Power Commission determining just and reasonable rates on an area basis. The rate-making provisions of the Natural Gas Act are practically identical with §§ 204 and 205 of the Commu-

nications Act. In § 4(d), 15 U.S.C. § 717c(d), the Natural Gas Act provides for carrier-initiated changes by filing appropriate schedules, with a maximum suspension period of five months. Section 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a), is similar to § 205(a) of the Communications Act in providing for the prescription of rates "to be thereafter observed."

There was no dispute, and the Court held, that the order of the Federal Power Commission was a prescription of rates under § 5(a). In its order, the Commission imposed a moratorium of two and one-half years on filings under § 4(d) for prices in excess of the applicable area maximum rate. It is thus clear that in the view of the Federal Power Commission a rate prescription under § 5 did not bar future carrier-initiated rate changes under § 4(d). Under the erroneous view adopted by the Federal Communications Commission in the instant case, such moratorium would have been unnecessary.

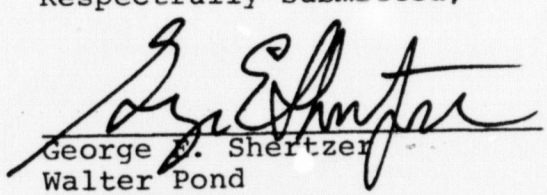
In upholding the moratorium, the Supreme Court also proceeded on the basis that the rate prescription by its own force did not preclude the filing of carrier-initiated rate changes. The Court said (at 781):

> "We cannot, given the apparent stability of production costs, the Commission's relative inexperience with area regulation, and the administrative burdens of concurrent area proceedings, hold that this arrangement was impermissible. We need not attempt to prescribe the limitations of the Commission's

> authority under §§ 5 and 16 to impose moratoria upon § 4(d) filings; in particular, we intimate no views on the propriety of moratoria created in circumstances of changing costs. These and other difficult issues may more properly await both clarification of the Commission's intentions and the necessities of the particular circumstances. We hold only that this relatively brief moratorium did not, in the circumstances here presented, exceed or abuse the Commission's authority."

Of course, in its 1972 order in Docket No. 19129 the Federal Communications Commission did not impose a moratorium on carrier-initiated rate changes, nor would it have had any justification for such action. Thus, even if the 1972 order could conceivably be construed to be a rate of return prescription, the opinion of the Supreme Court in Permian Basin leaves no doubt that it furnishes no valid legal basis for the rejection of the tariff.

Respectfully submitted,



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May 1, 1975

CERTIFICATE OF SERVICE

I, George E. Shertzer, a member of the Bar of this Court, certify that I served a copy of the attached Brief for Intervenors, General Telephone Company of California et al., this 1st day of May, 1975, by mail, postage prepaid, on the Federal Communications Commission, the United States of America, and each of the participants before the Federal Communications Commission in its consideration of American Telephone and Telegraph Transmittal No. 12241, as set forth in the attached list.

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